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Supreme Court Of The United States

October Term, 1971

NO. ~~71-649~~ 71-639

WATSON CHAPEL SCHOOL DISTRICT
No. 24 ET AL ..... *Petitioners*
IN RE: JOHN NORMAN WARNOCK

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners pray that a writ of ceritorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on August 11, 1971.

CITATIONS TO OPINIONS BELOW

Opinion of the Circuit Court of Appeals printed in Appendix (A) (Reported in 446 F. 2d 933 (1971)).

JURISDICTION

The judgment in No. 20,699 against the Watson Chapel School District was affirmed and the case remanded to the continuing jurisdiction of the District Court. And the appeals in No. 71-1175 against the members of the school board and the school superintendent and No. 71-1180 against the school board counsel John Norman Warnock

were ordered dismissed as moot. Jurisdiction of this court is invoked under 28 USC Paragraph 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of Articles I and II of the United States Constitution, as well as the First, Fifth, Sixth, Tenth and Fourteenth Amendments thereto, are set forth in the appendix at page 36.

The pertinent portions of the United States Code, to-wit: 18 USC Paragraph 401, 42 USC Paragraph 1983 (1-3), 42 USC 2000c (b) and 42 USC 2000c-6, Whitten Amendment HR 16916, June 25, 1970.

QUESTIONS PRESENTED

I

The overriding question is: If it were unconstitutional as decided in the Brown Case for a State to assign a child to a specific school according to *race;* is it constitutional for Health, Education and Welfare Department, an administrative Agency of the Federal Government, through Federal Court Orders to close schools, deny students admittance to schools nearest their homes, and assign to other schools according to *race* in order to obtain a racial balance, and to force the busing of such students for that purpose at state expense?

II

Just because members of the Watson Chapel School board have been relieved of contempt convictions, but are still under injunctive restraint and their counsel, John Norman Warnock, is not under a court order requiring

him not to make a public statement or engage in any mass meeting at the time the appellate court decision was rendered 11 August, 1970, although he was under this restraint at the time his case was heard, does this make all violations of personal liberty, procedural defects allegedly committed by the lower court during the trials . . . moot?

STATEMENT OF FACTS

The petitioners, Watson Chapel School District, comprise some one hundred twenty five square miles, two high schools, two junior high schools and four elementary schools.

The Coleman School complex, which included grades one through twelve, was located in the Negro neighborhood, consistent with a housing pattern of over one hundred years duration. Some three miles away is Watson Chapel High School, junior high school, and three grammar schools distributed in the district and located in a predominantly white area.

Without any known complaint from any parent or student of the manner in which the school was being operated, a representative named A. T. Miller, from the HEW office in Dallas came in July, 1970, and informed the school superintendent that they were operating unconstitutionally.

He spent less than six hours in the district and submitted a plan which involved pairing of the first two grades at one school, another two grades at another school, etc., the implementation of which would cause the complete disruption of the orderly processes of education and transportation at the schools.

The school board informed HEW, whose representa-

tives would never meet with the people, that they were elected by the people to perform their task to the best of their ability and that they intended to do so and did not care about the receipt of any federal funds.

When the school board refused to voluntarily comply with the HEW orders a suit was filed by the Justice Department in which it was claimed that they had certain complainants who allegedly felt that their equal protection under the Constitution had been violated.

If there were such complainants, they had not exhausted every remedy that they had before going to the Federal court because they had never complained to the school board.

On 10 August, 1970, at hearing before the District Court, the school board was informed that they were operating a dual system of schools.

During the proceedings, HEW produced one witness, Mr. A. T. Miller, who was never qualified as an expert.

The school board and some twenty-four citizens testified that the HEW plan would destroy quality of education, lower property values, and impose extreme inconvenience and financial losses.

The Court refused to take the preponderance of the evidence on the part of the defendants into consideration and without further hearings ordered on 17 November, 1970, a modified HEW plan into operation at the beginning of the second semester.

Mass meetings were held wherein it is estimated that over 90% of both races considered the plan educationally unsound and financially prohibitive and urged the school board not to comply.

The school board did not comply on the 18th of January, the beginning of the second semester. On the 5th of February, 1971, the school board and superintendent were tried for contempt of court, and found guilty.

In essence, they were told that if they would each pay three hundred fifty dollars a day and sit in jail, they could operate the school, in the manner in which they felt was constitutional, that of "freedom of choice."

This amounted to about two thousand one hundred dollars a day in damages to unknown complainants. And for the remainder of the school year, would have approximated two and one half million dollars which is two and one half times the normal school's yearly budget.

Faced with such arbitrary and capricious sanctions, which was imposed by the court as damages, yet no damages were ever proven, no evidence was ever shown that any complainant existed or had been damaged, the school board capitulated.

In fact, the court would not let the school board members testify fully to show cause why they felt that they should not be held in contempt.

The court took the dictatorial position that there was only one question: Have you or have you not implemented the orders of the court?

At the conclusion of the hearing on the fifth of February, the court addressed himself to counsel for the school board and told him: You will make no further public statements or arrange at any mass meetings, but that you will represent your clients in every way possible. His clients included the 5,400 electorates of the district, protest organizations besides the school board, but the court did not explain how he was to communicate with his clients.

The board, realizing that they could not pay the extreme amount of money, stepped aside and let the court run the school.

Since no federal funds had been provided for transportation or the requested construction of a new centralized high school, the school board in compliance with Arkansas law, which does not require busing of any students, grounded all buses.

Then on the 18th of February, 1971, the court ordered that the school institute busing with state funds and to buy school buses under Title I Federal Funds.

As a result of an aroused populus of the State of Arkansas, including its legislature which condemned the judge for depriving an attorney to his right of speech in assembly, the news media consistently requested that the attorney test the order by making a public statement.

Until he did so he answered all questions with his name, rank and serial number as a political prisoner.

After the surprise order Attorney Warnock, on March 28th, at an appreciation rally in the Heston Stadium, Pine Bluff, where representatives from eight states had come to pay tribute to Watson Chapel, and Colonel Warnock, Attorney Warnock made a short five minute statement of appreciation and confidence that we will win in the end.

Two days later while representing a client in a case in El Dorado, Arkansas, a State Court of general jurisdiction, the court was forcibly closed down by two U.S. marshals under the order of the district court and Colonel Warnock was arrested and brought under arms to Little Rock, one hundred twenty miles away where he was momentarily placed in detention at the jail in the Federal building with

two members of the school board who had been in jail for two hours waiting. He had not been given the chance to know what the charges were against him, to obtain witnesses in his behalf, to make motions and had little or no time to prepare a defense with his attorney.

For the next nine hours without food or water the members of the school board, Mr. Garmon and Mr. Mitchell with Attorney Warnock were tried in a criminal atmosphere on an alleged civil contempt action.

There were no complainants, no evidence that anyone had been damaged presented, and there was no evidence presented that Warnock had encouraged anyone to disobey the edict of the court.

He did not deny that he considered the order illegal in violation of his rights under the First Amendment of the U.S. Constitution.

He was fined $500 and ordered that if he did not sign a certificate to the effect that he would make no further public statements or engage in any mass meeting by Friday of that same week that he would be placed in jail and fined $350 a day.

When Colonel Warnock appeared at the office of the U.S. Attorney in Little Rock with $500 and demanded to know who he had damaged and who would receive his five hundred dollars, he was told that he did not have to pay the $500 fine. He signed the certificate, upon advice of his counsel, and appealed his contempt conviction.

After arguing the appeal before the Eighth Circuit Court of Appeals on the 18th of June, 1971, within a week or two he received a letter from the District Court returning to him his right of speech and assembly.

REASONS FOR GRANTING THE WRIT

(QUESTION ONE)

The decision of the Court of Appeals should be reversed under Rule 19 of this Court for the following reasons:

1. District Court forced school board to bus students for racial balance in violation of the 1964 Civil Rights Act when there was no Arkansas statute requiring busing at all.

2. Ordered School board to buy buses under Title I Funds and at the same time to violate the Whitten Amendment to the HEW appropriation bill.

3. Did not rule properly whether HEW witness was qualified to testify as an expert.

4. The preponderance of the evidence was to the effect that the HEW Plan was educationally unsound and financially nonfeasible, and would not work. Both District and Appellate Courts failed to recognize this and to properly evaluate the evidence in favor of the petitioners.

With regard to question One, I have explained to my clients that the facts surrounding the desegregation of Watson Chapel School are almost synonomous with the facts in the Swann case, similar to the Pontiac case and the Chinese case in San Francisco. In view of the action by this honorable Court on these complaints, that it would do little or no good to ask for relief by writ for them.

However, since the demonstration of Congress on Thursday, the 4th of November, 1971, with the amendments attached to the Health, Education and Welfare appropriations they feel that maybe the Court will get a message from the people.

Especially, with the revolt against the Alexander de-

cision wherein it was ordered, "Integrate now and litigate later", as well as the Swann decision requiring the State to bus for "racial balance" on State funds.

And since the Court did an about face in the Green case by saying that a child can be assigned to a school according to race so long as the courts did it and not the state, it is hoped that with a change of heart, and new personnel it would return to the Brown decision.

Without this hope, I feel something like the carpenters who built targets for the navy. Each day they would expend their work on floating mock ships to be towed out to sea and blown up by navy guns. After seeing yours and others' efforts destroyed time after time, it finally affects your morale and you arrive at a sense of uselessness.

But I am encouraged by the indominable spirit of the people, and that this is still the land of the people despite court edicts.

For this reason I am acquiescing in the desires of my clients, that if I do nothing else they want me to tell this honorable court what the federal court order has done to their once proud school.

On the day the court ordered plan was implemented, some one hundred US Marshals were brought into the Watson Chapel area. They were instructed to help the local police maintain order, but more specifically the US Marshals were there to prevent the parents from taking their children to their neighborhood schools or the schools of their choice. They ordered the parents under threats of prosecution to take their children to the school the *court had ordered them to attend.*

Thus as a result of such dictatorial policy, unheard of

before in any civilized nation, and the resulting chaos more than a thousand whites and many blacks boycotted the school, and most of these remained out of school for the rest of the semester.

At the beginning of this school year there are still more than five hundred who have not returned.

As a "starting point" private schools were formed where as many as 250 former students of Watson Chapel are attending.

As a result of the forced mixing of races the school is plagued with unheard of disciplinary problems, vandalism and destruction of property the extent of which did not exist in either area before.

But the complaint which seems to have most parents worried, and is repeated more often, is the feeling that educational standards have been lowered.

The request of this petition is a sincere, simple and basic one. The majority of the parents of both races want the control of their school returned to the local officials who were elected by them and to have the schools operated as they desire.

They want their schools to be open for attendance by anyone regardless of race, color or creed who is qualified to be admitted.

They do not believe that the Constitution properly interpreted would prevent those who bought houses near a school from having their children attend that school.

They do *not* want them bused long distances needlessly with loss of valuable time, and the additional fear of loss of life and limb for an experimental purpose of mixing the races.

They want this right returned to them without legal subterfuge.

For the government to say that a black child can not learn unless he is in the classroom with whites is not only an insult to the child but an insult to his race.

So let's take an individual case where a Negro child is placed in the classroom with whites under the "rub-off" theory and he is told he is just as smart and has just as much ability as the white students. Now get in there and listen for a while and you will be just as smart as they are.

In too many instances after about a week his first reaction is disappointment; disappointment in himself and disappointment in those who wrongly informed him. Then he becomes disgusted; disgusted because he cannot keep up. And then he becomes discouraged to the point of becoming disgruntled with teachers, students and himself until there boils up in him resentment that explodes into a rebellious and destructive nature.

Instead of having a student which the teacher is to educate, she has a disciplinary problem for which she must spend too much time trying to control to prevent complete disruption in the classroom until she has little time left to teach the others who are there to learn.

Education, as it is well known, is a mental process of accumulating knowledge. There are many ways of doing this, reading, TV, travel and conversation, all of which must stimulate the thought processes so that what is observed can be reasoned and stored in the brain.

From the HEW theorist point of view those who attended segregated schools are not fully educated. They have not had a racial experience.

It is not difficult for any observer to realize when you have two races, one black and one white and you forcefully mix them in a school you do not have and can never have a racially unitized school. You have a school which is recognized as part black and part white.

And to bus a child unnecessarily regardless of color away from his home to another school some three miles away to attend segregated classes is pure folly. It is not only happening in Watson Chapel but other schools across the South.

The law of the land is the Constitution, and laws promulgated and enacted by elected representatives of the people.

Then the question is, can the Supreme Court use its equity powers in an interpretation of the "equal protection" clause of the 14th Amendment to override any act of Congress through whom the majority of the people have spoken in the democratic process?

Especially when this judicial authority is experimentally exercised upon some judicial myth which has never been proved correct that when a child of a minority race is not able to attend a school where another race is in the majority, he suffers psychologically. It should be apparent from all observation that when such child is forced into the other school of the majority this is the time he becomes a "second class" student and thus suffers a psychological shock for many reasons.

To bus a child out of a black neighborhood to a white school and then bus him back to the black neighborhood at night is more damaging psychologically than to let him go to his neighborhood school. Most sociologists will tell you

this. If this is done, purely, to mix the races so that we will have only one color as an American — a coffee colored human being — then it will fail as it has already failed.

Most of the people who will tell you that forced integration is working in education are those who are paid to tell you so.

President Nixon has stated publicly many times that employees of the Federal Government or Federal Judges were not empowered to order transportation of students for racial balance purposes.

This position has been spelled out by Congress not only in the 1964 Civil Rights Act, but has been repeated in various Appropriation Bills of 1966, 68, 69, 70.

Yet, we had a paid employee of the HEW, who came to Watson Chapel with a long title, a short pencil and a clipboard and dissected an institution in four hours that had been in operation over a hundred years.

In violation of the law, he told the court that the races had to be mixed to a mathematical proportion in all the schools. Yet, every school, *if* we had been allowed to present testimony, we could have shown where he had forced his plan, it had failed. Therefore, he is no expert in the field of education or racial relations and should not have been permitted to testify.

In case after case, this is precisely what federal employees have been doing throughout the South, resorting to the use of the Federal Court edicts to enforce their Socialistic plans for experimentation in the schools. Direct and obvious contradiction of what the law asserts.

The explanation offered, is that Congress intended to

outlaw busing in cases involving desegregation in so-called "de facto" segregation resulting from residential patterns. And when the court discovers any hint of "de jure" or legal segregation they may order busing for racial balance as they please. The important distinction is that the 1964 Civil Rights Act says nothing of the sort. It says that Federal employees and Federal Courts are not empowered to order busing period.

When the court ordered the school board to disobey the law embodied in the 1964 *Civil Rights Act* and forced desegregation by busing for racial balance, it is not *inconsistent* then when the same court ordered the school board to buy buses under Title I Funds which is again in violation of the law.

A rising storm is gathering from a disturbed people who read in the daily news that Russia will soon have the largest Navy in the world. While they build ships to encircle our country, our Courts are ordering us to build buses to drive our children around the country in circles.

The action of the court has resulted in the lowering of the level of education of the whites, and the converse for the blacks has not shown any corresponding progress. If this is the purpose the nation as a whole will suffer. For when white man falls, black man will fall with him.

It is the superior education of the Caucasian which has led the progress of mankind in every field of endeavor in the recorded history of the world. From the time he stopped to till the soil, build cities, circumnavigate the world, and spew himself to the moon, other races to varying degrees have been dependent And no court order in the fading years of the 20th Century shall change that without causing a return to the Dark Ages.

(QUESTION TWO)

The decision of the Court of Appeals should be reversed under Rule 19 of this Court, "or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

It is the contention of the petitioners that based upon the evidence and pleadings the appellate court should have either affirmed the convictions of contempt or set them aside.

There were alleged injustices, improprieties, discrimination, procedural defects, and the important question of whether or not the judge actually conducted a criminal contempt proceedings under the guise of so-called civil contempt has not been answered.

Some other questions not adjudicated:

1. Were Petitioners denied constitutional rights because of the contended arbitrary, injudicious, vindictive, unfair and discriminatory manner in which their trials were conducted, i.e. (a) Not permitted to testify in their own behalf, (b) Not permitted time to prepare case or secure counsel, (c) Not permitted to obtain witnesses in own behalf.

2. At the Trial Prosecution witnesses were given VIP treatment, but witnesses who came to testify for petitioners were forced to stand, and endure other indignities. Four members of the board who were opposed to unitizing school were forced to disclose financial conditions in public while the remaining member was not so embarrassed.

3. Petitioners in civil contempt should have known

who brought the charges against and have proof shown how they had been damaged; i.e., if the petitioners had chosen to pay sanctions to whom would their fines have gone?

4. Is an attorney representing his clients in the strict sense of the word, an "officer" of the court?

5. When a Judge has initiated civil contempt proceeding, for an alleged contempt of his order, should he preside over such proceedings or step aside so that another judge can preside?

6. When a civil contempt takes on the character of a criminal contempt should the defendants have the right for a trial by jury?

The mere fact that petitioners were not subject to fines, penalties and jail terms at the time the appellate decision was rendered in August, 1971, they had already suffered the pangs of conviction, loss of personal liberty and property, and were at the time of the decision of the court, and are now under an injunction not to interfere with court operation of the school for the purpose of establishing a racial balance, should not make all matters moot.

At this time they are subject to being brought before the court for failure to obey the minutest detail order of the court, such as, preventing text books from getting into the hands of those students who have failed to return to school, hiring and firing of personnel, over which the board has lost control, and are forced to use State funds to bus for racial balance and even to obey the court's order to buy buses under Title I Funds.

First the petitioners contend that the order of the District Court on the 17th of November, 1970 complained

against in question number One is unconstitutional. That the Federal Court has interfered with the official operation of a State institution which the petitioners, the school board were elected by the people to operate, and that they were so operating in a legal nondiscriminatory manner in compliance with the 1964 Civil Rights Act.

This is not an analogous matter as the cases referred to by the appellate court of failure to produce a document, or a tax case. This is a Federal indictment and conviction of state officers performing their official duty.

In the case of John Norman Warnock, he was under the order of the District Court not to make any further public statements or engage in any mass meetings at the time the case was heard on the 17th of June, 1971.

Whether or not the Appellate Court communicated with the District Court and requested that attorney Warnock be relieved of the restraint, is not known by your petitioner. However it is strange that within two weeks after the case was heard the district judge discharged his Order.

Petitioner does not agree that it would be an advisory opinion of the Appellate Court to decide whether the District Court action was proper or improper, legal or illegal.

The question is, should the contempt convictions stand or be set aside?

They further contend that it should not be necessary for the petitioners to have to resort to bringing an action against the judge of the District Court to determine whether or not the Court's action was proper.

To put it out on the sand table so everyone can see it — One of the petitioners asked your petitioner as his attorney,

when I have to answer the next sworn questionnaire that asks me if I have ever been convicted of a crime, do I have to answer *yes* I was convicted of contempt of court, or can I say *no* and not be subject to perjury?

And if the Appellate Court can sweep under the judicial rug all of the questions raised about the impropriety of the conviction with one "moot" sweep, will there ever be any judicial determination to which the petitioner can turn, to erase the stigma from his records.

Is his answer "Yes" for the rest of his life because there is no judicial review of a contempt conviction from which you are later purged?

The paradox which confuses even the most astute laymen is how can an official be found guilty, of all things, of obeying the law?

The school board had been operating precisely in accordance with the 1964 Civil Rights Act — a law which has never been declared unconstitutional.

CONCLUSION

If you will pardon me for revealing to you the observation of many Americans of late, that in school matters the Supreme Court instead of wearing the cloak of Equity appears to be the highest paid school board in the history of public education, and all that the petitioners are requesting is that you return this responsibility to them, who were elected to carry it out.

The people have spoken. Polls have reported that up

to 86% of both races across this nation are against busing for racial balance.

The US House of Representatives has spoken. It has disallowed the use of any federal funds for forced busing, and will not permit the Federal Government to force the use of state funds for that purpose.

There is no indication that any school plan produced by the marriage between the HEW and Federal Courts has increased the overall standards of education in any institution so experimented.

Like another agency of the Federal Government (OEO) designed to fight poverty, yet after the expenditure of billions of dollars, reports show that poverty has actually increased.

But it is the poverty of the mind which is the most costly to the nation.

Should the Federal Courts continue their unrelenting, non supported position except, for example by the NAACP, and a few others, the States will speak through a Constitutional amendment taking the Federal Courts out of state school business.

The Court should be able to take judicial notice of what has happened in the District of Columbia public schools. They were the "starting points" of what is now happening in the South and other parts of the nation which have been infected by Federal intervention in the orderly operation of schools.

And when an attorney is not allowed to criticize a Court's order without it being called defiance, the advocacy system of jurisprudence of our nation is in serious jeopardy.

It is respectfully submitted for the reasons set forth above that certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 20,699

United States of America,
Appellee,

v.

Watson Chapel School District No. 24, et al.,
Appellants.

No. 71-1175

United States of America,
Appellee,

v.

Watson Chapel School District No. 24, et al.,
Appellants.

No. 71-1180

United States of America,
Appellee,

v.

Cotton Plant School District No. 1, et al.,
In re: John Norman Warnock,
Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

[August 11, 1971.]

Before LAY, HEANEY and BRIGHT, Circuit Judges.

Lay, Circuit Judge.

These appeals, consolidated for argument, involve (1) the propriety of the district court's order in requiring Watson Chapel School District No. 24 to implement a H.E.W. plan for a unitary school system; (2) the district court's order finding members of the school district guilty of civil contempt in failing to comply with the judgment of the court requiring implementation of that plan; and (3) the district court's order finding the attorney for the school district guilty of civil contempt and barring the attorney from future conduct in derogation of the court's decree.

We find no merit in the objections to the district court's order requiring implementation of the H.E.W. plan. We affirm the judgment in No. 20,699 and remand the cause for continuing jurisdiction of the district court. We find the appeal by the school board members from the court's finding of civil contempt moot and dismiss the appeal in No. 71-1175 for lack of jurisdiction. We likewise find the appeal by the board's attorney, John Warnock, as to the judgment of civil contempt moot and similarly dismiss the appeal in No. 71-1180 for lack of jurisdiction.

The appeal in No. 20,699 arises from a single complaint filed by the United States to require seven school districts in the State of Arkansas to adopt a unitary school system. The complaint was filed July 8, 1970, by John N. Mitchell as Attorney General of the United States, pursuant to 42 U.S.C. § 2000c-6 of the Civil Rights Act of 1964. Attached was the Attorney General's affidavit that complaints had been received from parents of minor children within the district that equal protection of the laws was being denied these children.

The record shows that the Watson Chapel District (located on the outskirts of Pine Bluff, Arkansas) covers 125 square miles. Over 50 percent of the students attending school in the district live within the city limits of Pine Bluff. In 1969-70 the district operated six schools. These schools had a total enrollment of 3,871 students. There were two high schools and four elementary schools. The Coleman High School and the Coleman Elementary School operated with 1,640 students, all black. In the remaining schools there were 96 black students and 2,135 white pupils. In the Watson Chapel High School there were 972 whites and 41 Negroes; in Owen Elementary there were 593 whites and 36 black pupils; in Edgewood Elementary there were 495 whites and 19 blacks; in Sulphur Springs Elementary, a rural school, there were 75 whites and no blacks. The few black students living in that area were bused to the Coleman schools. The faculty was for practical purposes completely segregated.

The district court assumed jurisdiction and ordered the parties to work out a satisfactory plan. On July 24, 1970, the United States reported that the Watson Chapel School officials had failed to agree on a plan and that the representative of the Office of Education would submit a plan on or before July 31, 1970. This plan was filed. The plan came on for hearing before the district court on August 11. On that date the district court found that a dual school system was being operated in the Watson Chapel District and that the plan of the Department of Health, Education and Welfare (H.E.W.) would "completely desegregate the district, but that the school district should be given an opportunity to develop a plan of their own to meet constitutional requirements." This plan was ordered to be filed no later than August 26, 1970.

The school district thereafter filed alternative plans. The first plan was a long range projection to raise five million dollars to build sometime in the future a central junior and senior high school complex. The second plan was simply a modified continuation of the previously rejected "freedom of choice" plan. This plan left 98 percent of the white students in the formerly white schools and 98 percent of the black students in the formerly black schools. No assignment of faculty or staff members was proposed. The district court rejected both plans.

On September 14, 1970, the district court ordered the partial implementation of the H.E.W. plan and enjoined the school district from operating a racially discriminatory dual school in Watson Chapel. Although the school semester was already under way the district court granted the school board until October 15 to work out an alternate recommendation to the H.E.W. plan that would be less burdensome and more satisfactory. On October 15, 1970, the school district responded that "there is no constitutional requirement for race mixing" and entered another formal objection to the H.E.W. plan. The school district supplemented their previously rejected proposal only by a suggested additional zoning to include a "proposed" housing area to be included in the zone occupied by the all black schools. The United States responded that few whites would ever live in the new area. Thereafter on November 17, 1970, the district court in rejecting the school board's last illusory effort wrote:

> "The school district has failed and refused to present a plan reasonably expected to comply with the law. The Court has no alternative at this late date but to require the school district to operate under a lawful system. The Court has considered the two plans

recommended by the Department of Health, Education and Welfare, as well as other alternatives, and concludes that the alternate plan suggested by the Department of Health, Education and Welfare would offer a more reasonable and adequate solution to the school's needs and requirements for a unitary system as required by law."

The final alternative plan submitted by H.E.W. on October 2, and accepted by the district court, restructured the district into a unified system reflecting the following racial changes.

School	Grade	Student Enrollment	
		W	B
Watson Chapel	9-12	613	486
Coleman Elem. and High	5-8	710	617
Owen Elem.	1-4	399	351
Edgewood Elem.	1-4	327	267
Sulphur Springs Elem.	1-4	75	25

The district court fixed zone lines between the elementary schools. The court also required desegregation of faculty and other staff until "the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system."

The complete plan included appropriate orders as to future school construction and site selection, reports and transportation to promote a nonracial school system. The school board filed notice of appeal on December 11, 1970.

On February 6, 1971, the district court entered an order finding the Board of Directors and Superintendent of

Schools in civil contempt in wilfully failing to carry out the court's decree. The court allowed the board until February 11, 1971, to implement the plan or have sanction imposed. On February 11, 1971, the superintendent filed a report indicating substantial steps had been taken to implement the court's order of November 17, 1970. On the basis of this report the court entered an order on February 12 relieving the school board members and the superintendent of contempt penalties. However, at the same time the school board indicated that transportation facilities in the district had been temporarily suspended on the advice of counsel.

The court's order of November 17, 1970, had provided:

"The transportation system shall be completely re-examined regularly by the Superintendent, his staff and the school board. Bus routes and the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis."

The court clarified this order on February 18, 1971, by decreeing:

"It Is Therefore Ordered that the Board of Directors of Watson Chapel School District No. 24 and the Superintendent of Schools reinstate the transportation facilities on a basis which will insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis. Transportation for eligible pupils at the Sulphur Springs Elementary School shall be reinstated immediately. The Superintendent of Schools is directed to collaborate with the Arkansas State Department of Education in order to redraw existing bus routes and

> develop procedures and policies to insure the transportation of all other eligible pupils on a non-segregated and otherwise non-discriminatory basis."

A motion to stay or dismiss the supplemental order was filed by the school district on February 26, 1971. On March 2, 1971, the district court in a comprehensive order denied this request. The district court concluded:

> "It is established that the school district provided bus transportation for eligible students in the district prior to and up to the time of implementing the desegregation plan by order of the court. It is quite obvious that bus transportation was suspended as a result of the desegregation order, and, therefore, based on racial considerations.
>
> "While this Court does not assume jurisdiction of transportation facilities by bus in the operation of the Watson Chapel schools, unless based on racial considerations, jurisdiction of the transportation facilities by the Court was established in the Court's order entered November 17, 1970. This being a part of the Court's continuing jurisdiction and as included in the Court's order of February 18, 1971, sufficient time having elapsed since the implementation of the plan, transportation for eligible students should be continued by the school district. The Court concludes that the order reestablishing bus transportation for eligible students who desire it is not only appropriate but desirable."

As indicated, appropriate appeals were filed from the court's order implementing the H.E.W. plan, and the findings of civil contempt of the board members and the school

board attorney, John Warnock. We shall consider their contentions seriatim.

No. 20,699

There can be little question as to the propriety of the district court's action in ordering the adoption of the H.E.W. plan. Complaint is made that local control of schools is being divested by Washington officials, that "freedom of choice" as adopted by the school is the only constitutional plan, that the school attendance is based solely on de facto housing patterns and that busing is per se unconstitutional. These complaints conveniently ignore the history of this case.

The district court was required under a constitutional mandate to order a unitary school system in the district. The school system as it was being operated was clearly impermissible in that it did not present any effective plan of integration. Judge Harris' ultimate decree requiring implementation of the H.E.W. plan patiently and painstakingly was rendered after giving the school district at least three distinct opportunities to study and submit a workable plan of its own. In all practicality there was complete defiance of the court's request and the only effort made was to offer illusory proposals which admittedly continued the school district's dual system where schools were easily indentifiable as "black" or "white" schools.

This court has studied the final H.E.W. plan submitted to Judge Harris. We find it to be a thorough study and balances equitable considerations of the respective parties. It may not be the most complete or workable solution. However, the district court has now approved the plan and is satisfied that it will achieve a unitary school system.

The school board has made no effort whatsoever to cooperate or to aid in solutions.

There is no merit to the argument that the school locations and pupil assignments are patterned on solely a de facto basis. See *Haney v. County Board of Education of Sevier County, Arkansas*, 410 F.2d 920 (8 Cir. 1969). As to the constitutionality of the freedom of choice plan operated in the school district, the record demonstrates that in 1969-70 94 per cent of black students remained in all black schools. The district court properly ruled this plan impermissible. See *Raney v. Board of Education of Gould School Dist.*, 391 U.S. 443 (1968); *Green v. County School Board*, 391 U.S. 430 (1968); *Kemp v. Beasley*, 423 F.2d 851 (8 Cir. 1970).

The district court based its jurisdiction to require a transportation system on the fact that the school district was already engaged in busing over 1,200 students. The record indicates that these students were mostly white students, since the great majority of blacks lived close enough to the Coleman complex so as not to require busing.[1] The decisions of *Swann v. Charlotte-Mecklenburg Board of*

[1] The record shows 98 percent of the colored people live within a two mile area of the previously all black Coleman School. The district operated in 1969-70 with 14 buses. Twelve Hundred Sixty students were bused according to district records in that school year: 48 were black, 1,212 were white students. Thus 33 percent were being transported. The principal of the school board testified the H.E.W. plan would double the requirements of busing. A. T. Miller, a program officer for the United States Office of Education in directing the H.E.W. plan observed that the plan would require, "the rerouting of present buses and if there were to be an increase it would be very slight. However, in our studying it we did not see that there would be a great increase as far as the number of buses to be used. No increase at all in that matter but just a slight extension of the bus run." This court was informed at oral argument two new school buses were acquired last spring in order to fully implement the new transportation schedule.

Education, ... U.S. ..., 91 S.CT. 1267 (1971), and *McDaniel v. Barresi*, ... U.S. ..., 91 S.Ct. 1287 (1971), fully demonstrate the district court's equity power to require transportation whenever and wherever necessary to disestablish a dual school system. As stated in the *Swann* case the record here supports "[t]he importance of bus transportation as a normal and accepted tool of educational policy." 91 S. Ct. at 1282.

The district court in its opinion of March 2, 1971, observed:

> "In its order of November 17, 1970, the Court considered the available facilities, the location of the facilities and how they could be utilized in the operation of an integrated system in a manner to comport with constitutional standards. To achieve this objective, there can only be one high school and one school facility such as the Coleman Schools for grades five through eight. The three available lower elementary schools appropriate to this district's operation is best suited for zone areas for each such elementary school.
>
> "The school board, even though it has the responsibility to propose in good faith an acceptable plan, has failed to submit or offer a program that would be reasonable or acceptable with any hopes of disestablishing the traditional dual system of its schools. These uncontradicted facts illustrates that the method of operation of the schools as required by the Court's order does not lend itself to the question of racial balance. This is further demonstrated by the fact that the Sulphur Springs Elementary School's racial makeup is 75% white and 25% black. In the other two elementary schools the racial complexion is sub-

stantially different. The contention of the defendant is wholly unacceptable."

We conclude that the district court's order requiring an integrated school plan in all respects should be affirmed.

No. 71-1175

The district court's order of November 17, 1970, required the school board "[b]eginning no later than the commencement of the second semester of the 1970-71 school year . . . (to) assign students in accordance with the alternate recommendation of the Department of Health, Education and Welfare submitted on October 2, 1970 . . . ."

No action was taken to effect this plan or to comply with the court's order. The second semester commenced January 18, 1971. On January 20, the United States sought an application for sanctions against each member of the board and the superintendent due to the segregated basis of operations. The matter came for hearing on February 5, 1971. The district court found a knowing and wilful failure of the board and superintendent to implement its order of November 17, 1970. The court found each of the members and the superintendent in civil contempt and ordered them to file a sworn affidavit by February 11 stating their intention to comply or not to comply to implement that order; on failure of any member to do so the court ordered their individual incarceration in the custody of the United States Attorney General and a fine of $350 per day until the remainder of the school year.

On February 11, 1971, appropriate affidavits were filed and a detailed statement implementing the court's order was attached. Notwithstanding the board's refusal to

adopt a transportation system,[2] the court found compliance with its previous contempt order and on February 12 relieved the parties of any penalties. An appeal was filed from the court's order of February 6, 1971, as to the original imposition of sanctions ordered.

We find the matter not reviewable since the issues are moot. There has been full compliance with the court's order. The record shows the parties have purged themselves of any contempt citation, and the sanctions have been lifted. Under these circumstances there is no justiciable controversy pending before this court and the appeal must be dismissed for lack of jurisdiction. See *St. Pierre v. United States,* 319 U.S. 41 (1943); *F.T.C. v. Stroiman,* 428 F.2d 808 (8 Cir. 1970); *Murrell v. United States,* 253 F.2d 267 (5 Cir. 1958), cert. denied 358 U.S. 841. Cf. *Guerrero v. Capital Fed. Savings & Loan Ass'n,* 415 P.2d 257 (Kans. 1966).

No. 71-1180

On March 29, 1971, the district court ordered a writ of attachment against John N. Warnock, attorney for the school board, to show cause why he should not be held in civil contempt.[3] This order arose because of Warnock's "making public speeches, TV appearances, arranging mass meetings in defiance of the court's orders and continuing

[2] This was later clarified and required to be fully implemented in the court's March 2 order, supra.

[3] Due to our ultimate holding of lack of jurisdiction we make no observation as to the propriety of treating attorney Warnock's citation as one for civil contempt as contrasted to criminal contempt. As to the distinctions existing see the excellent summary of the governing principles of law in **Mechanic v. Gruensfelder,** 461 S.W.2d 298 (St. Louis Ct. App. 1970).

to urge resistance and defiance of the court's orders by patrons of the Watson Chapel School District and others."

The district court thereafter conducted a plenary hearing and found that Warnock had "knowingly, wilfully and wantonly obstructed the implementation" of the court's orders requiring a unitary school assignment plan for Watson Chapel.

The court found that Warnock had:

"[E]ncouraged patrons of Watson Chapel School Board No. 24 to send their children to schools other than those to which the children have been assigned pursuant to the order of this Court of November 17, 1970.

"[O]bstructed the orderly operation of schools after entry of the February 6, 1971 order of this Court by aiding and participating in actions by the defendant school board president calculated to threaten not to pay faculty and staff members of the school district in accordance with state law.

"[A]dvised and encouraged the defendant school board to suspend all transportation facilities prior to implementation of the court-ordered desegregation plan with the effect of frustrating and obstructing the orderly operation of the public schools in compliance with this Court's orders.

"[A]ppeared at mass meetings and made public statements to the mass media with the purpose and effect of encouraging mass disobedience to orders of this Court, and in so doing has impugned the honor and integrity of the Court."

The court then found Warnock guilty of civil contempt and ordered that unless Warnock certify on the same day "that he will refrain from taking actions which obstruct the orderly implementation of this Court's orders and that he will make no further public statements, including statements to the mass media, which are intended to, or have the effect of, encouraging disobedience with lawful orders of this Court" that sanctions would be applied. The sanctions included a fine of $500 on that date, $350 each day thereafter and incarceration until such time as full compliance, for the remainder of the school year.

On that date, April 2, 1971, Warnock filed a certificate agreeing to obey the court's order of February 5 and to refrain from the prohibited activities so long as he was counsel for the Watson Chapel School District.

Appeal was then filed as to the order finding Warnock in contempt. On April 6 the court determined Warnock's certificate to be in compliance with the terms of its order. The court relieved Warnock of the penalties imposed and stated that he will "be relieved so long as he takes no action contrary to the court's orders."

On appeal the appellant, Warnock, raises several legal issues, inter alia, that the order prohibiting "public statements" was too broad and violative of his freedom of speech.

We likewise find this appeal moot. There exists no existing sanction to present a justiciable controversy for appellate review. *In re Eskay,* 122 F.2d 819 (3 Cir. 1941). The contemnor has seen fit to certify that he has disengaged from any activity violative of or in encouraging violation of the court decree. By purging himself of the contempt, nothing remains.

The fact that the court conditions the relief on future compliance does not make the issue justiciable. Cf. *F.T.C. v. Stroman*, supra. Compliance is intended for all court orders until set aside by a higher court. The breadth of the court order can only be tested by actual facts. We only add that it requires little imagination and understanding to comprehend the full intent of the court's order as it specifically relates to defiance of the court's decree calling for a unitary school system in Watson Chapel School District. If the defendant is cited for future violation of that order the facts and procedure surrounding any future order can be subject to appellate review at that time. Cf. *St. Pierre v. United States*, 319 U.S. 41, 43 (1943). To render an appellate decision at this time would be to give an advisory opinion on abstract facts. This, we have no power to do.

The appeal in 71-1180 is dismissed as moot.

In summary, the judgment in No. 20,699 is affirmed and the case remanded to the continuing jurisdiction of the district court; the appeals in No. 71-1175 and No. 71-1180 are ordered dismissed as moot.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

ARTICLE I, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION ARTICLES I § I TO ARTICLE I § VIII, CLAUSE III.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

---

*The rest of the sections of Article I are not pertinent hereto.

ARTICLE II, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION ARTICLES I §I TO ARTICLE I §VIII, CLAUSE III

Section 1. The executive Power shall be vested in a President of the United States of America.*

---

*The rest of the sections of Article II are not pertinent hereto.

AMENDMENT I, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION AMENDMENTS I TO V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI, CONSTITUTION OF THE UNITED STATES.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT X, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION AMENDMENTS VI TO XIV.

The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION AMENDMENTS VI TO XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

APPENDIX C

STATUTES

42 U.S.C. §1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §2000c(b)

"Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or natural origin, but "desegretion" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

42 U.S.C. §2000c-6

TRANSPORTATION OF PUPILS TO ACHIEVE RACIAL BALANCE

. . . provided that nothing herein shall empower any of-

ficial or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

18 USC Paragraph 401

A Court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

WHITTEN AMENDMENT — H.R. 16916 in the House of Representatives, June 25, 1970. An Act making appropriations for the Office of Education for the fiscal year ending June, 1971, and for other purposes. . .

Section (39) Sec. 209 restored. . .

No part of the funds contained in this Act may be used to force any school or school district which is desegregated as the term is defined in title IV or the Civil Rights Act 1964. Public law 88-352, to take any action to force the busing of students; to force on account of race, creed, or color the abolishment of any school so desegregated; or to

force the transfer or assignment of any stud t attending any elementary or secondary school so desegregated to or from a particular school over the protest of his or her parent.

APPENDIX D

United States District Courts
Eastern & Western Districts of Arkansas
P. O. Box 1733
El Dorado, Arkansas 71730

Oren Harris
Chief Judge
Western District

April 14, 1971

Mr. Dale Spradlin
Superintendent of Schools
Watson Chapel School District No. 24
Route 7, Box 500
Pine Bluff, Arkansas 71601

Dear Mr. Spradlin:

* * *

One of the matters specifically referred to by the Court had to do with the obtaining of federal funds under Title I for the purchase of needed and necessary buses. The Court directed you to proceed with obtaining these funds and for the school board to co-operate.

* * *

Sincerely yours,
/s/ OREN HARRIS
OREN HARRIS

MYERS & ASSOCIATES

910 Pyramid Life Bldg., (501) 372-1809
Little Rock, Arkansas 72201

May 28, 1971

INVESTIGATION REPORT

TO: Col. John Warnock
Attorney-at-Law
El Dorado Highway
Camden, Arkansas 71701

RE: Civil Contempt

* * *

After researching the file we talked to Mr. W. H. Dillahunty, U.S. Attorney. Mr. Dillahunty advised that the charge in question was brought about by your failure to comply with an order issued by Judge Harris specifically ordering you not to make public statements regarding Federal Court, Watson Chapel, etc. According to Dillahunty *the charge would have been criminal contempt which would require a trial by jury;* instead, the Judge chose a *lessor* charge (civil contempt). As he explained it — like trying a felony as a misdemeanor.

* * *

/s/ MELVIN E. FRY
MELVIN E. FRY
Investigator

United States District Courts
Eastern & Western Districts of Arkansas
P. O. Box 1733
El Dorado, Arkansas 71730

Oren Harris
Chief Judge
Western District

June 24, 1971

Honorable John Norman Warnock
Route 2, Box 178
Camden, Arkansas 71701

Dear Mr. Warnock:

* * *

. . . the Court is lifting the restrictions imposed on you February 5, 1971, and included in the Court's Order of April 2, 1971. You are hereby advised that an order is being entered lifting any and all restrictions heretofore imposed by the Court and you, therefore, may proceed with any public appearances or statements without having any concern as to any effect it may have in connection with your representation as counsel for the Watson Chapel School district.

* * *

Sincerely yours,
/s/ Oren Harris, Judge